IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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| ACCELERATION BAY LLC, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | C.A. No. 15-228 (RGA) |
| | ) | |
| ACTIVISION BLIZZARD, INC. | ) | |
| | ) | |
| Defendant. | ) | |
| ACCELERATION BAY LLC, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | C.A. No. 15-282 (RGA) |
| | ) | |
| ELECTRONIC ARTS INC., | ) | |
| | ) | |
| Defendant. | ) | |
| ACCELERATION BAY LLC, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | C.A. No. 15-311 (RGA) |
| | ) | |
| TAKE-TWO INTERACTIVE SOFTWARE, | ) | |
| INC., ROCKSTAR GAMES, INC. and | ) | |
| 2K SPORTS, INC., | ) | |
| | ) | |
| Defendants. | ) | |

**DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION**

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December 28, 2015                          *Attorneys for Defendant*

## INTRODUCTION

As directed by the Court, the parties submitted a three-page joint letter addressing the disputed provisions of the proposed protective order.  (D.I. 44).[1]  Unhappy with the Court's resolution of the dispute (D.I. 47), Plaintiff has filed a 10-page motion for reconsideration simply repeating its arguments with more words.  (D.I. 48).  Plaintiff identifies no change in law, error, or newly discovered evidence to justify reconsideration; and ignores the showing required to show manifest injustice.  Plaintiff does not explain how barring any of Plaintiff's counsel who actually review Defendants' source code from participating in patent prosecution proceedings is manifestly unjust or clearly erroneous.  (D.I. 47).  Nor does Plaintiff explain why this Court's adoption of a source code definition used the Northern District of California's Model Protective Order is "manifestly unjust."  The motion should be denied.

## ARGUMENT

### I.    Plaintiff Has Not Even Attempted To Demonstrate The "Manifest Injustice" Required For Reconsideration.

Plaintiff presents no change in controlling law, new evidence or clear error of law or fact in its motion for reconsideration.  *Am. Civil Liberties Union Found. v. Dep't of Correction*, C.A. No. 09-179-SLR, 2015 WL 1951360, at *1 (D. Del. Apr. 29, 2015).[2]  Although Plaintiff uses the words "manifest injustice" in attacking this Court's resolution of the disputed protective order provisions regarding source code and *inter partes* review proceedings, it ignores the legal

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[1]    All citations to docket entries refer to C.A. No. 15-228 unless otherwise indicated.

[2]    As Judge Robinson explained, a motion for reargument under Local Rule 7.1.5 is the "functional equivalent" of a motion to alter or amend judgment under Federal Rule of Civil Procedure 59(e).  *Id.* The standard for obtaining relief under Rule 59(e) is "difficult to meet" and is only appropriate if the movant demonstrates: "(1) a change in the controlling law; (2) a need to correct a clear error of law or fact or to prevent manifest injustice; or (3) availability of new evidence not available when the judgment was granted."  *Id.*

meaning of those words in its motion.  Plaintiff does ***not*** allege that the Court has abused its discretion or that it has made an indisputable error.  Instead, it just complains that the Court's order will burden Plaintiff's trial strategy.  Although Plaintiff's motion doesn't actually say how the protective order language adopted by the Court hinders its trial strategy, a burden on trial strategy does not equate to manifest injustice.  As one sister court explained:

> "manifest injustice" is an error in the trial court that is direct, obvious, and observable, such as a defendant's guilty plea that is involuntary or that is based on a plea agreement that the prosecution rescinds.  A party may only be granted reconsideration based on manifest injustice if the error is apparent to the point of being indisputable. In order for a court to reconsider a decision due to "manifest injustice," the record presented must be so patently unfair and tainted that the error is manifestly clear to all who view it.

*Teri Woods Pub., L.L.C. v. Williams*, C.A. No. 12–04854, 2013 WL 6388560, at *2 (E.D. Pa. Dec. 6, 2013); *see also In re Titus*, 479 B.R. 362, 367-68 (Bankr. W.D. Pa. 2012); *Oto v. Metro. Life Ins. Co.*, 224 F.3d 601 (7th Cir. 2000) (manifest error is the "wholesale disregard, misapplication, or failure to recognize controlling precedent").  Manifest injustice is only rarely found and generally requires a showing of a factual impossibility.  *SeeMax's Seafood Cafe v. Quinteros*, 176 F.3d 669, 678 (3d Cir. 1999).  Plaintiff's motion simply re-hashes earlier arguments and does not even attempt to describe the sort of "'direct, obvious, and observable' error that the term manifest injustice evokes."  *Conway v. A.I. DuPont Hosp. for Children*, C.A. No. 04-4862, 2009 WL 1492178, at *7 (E.D. Pa. May 26, 2009).

## II.   The Court Correctly Found That A Prosecution Bar Should Be Extended To Post Grant Proceedings To Protect Defendants' Valuable Source Code.

The parties agreed that a prosecution bar was necessary.  Defendants proposed extending a prosecution bar to prevent those who actually review highly confidential source code from participating in post-grant review proceedings.  As Judge Robinson and the Federal Circuit have recognized, "'strategically amending or surrendering claim scope during prosecution' can

implicate competitive decision-making, thus giving rise to a risk of inadvertent use of confidential information learned in litigation." *Versata Software, Inc. v. Callidus Software Inc.*, C.A. No. 12-931-SLR, 2014 WL 117804, at *1 (D. Del. Mar. 12, 2014) (quoting *In re Deutsche Bank Trust Co.*, 605 F.3d 1373, 1380 (Fed. Cir. 2010)).  Plaintiff, in contrast, originally argued that the provisions imposed undue prejudice on Plaintiff by restricting its counsel of choice, maintaining a cohesive litigation strategy, avoiding duplicated efforts and increased costs, and preparing its case for trial.  The Court considered the parties' positions and correctly determined that a source-code based prosecution bar should extend to post-grant proceedings (e.g., *inter partes* reviews).

Plaintiff does not attempt to explain how this Court's decision regarding the prosecution bar could be considered so erroneous as to constitute manifest injustice.  In fact, Plaintiff does not even argue that this Court made an "indisputable" error or that it acted outside its discretion.  Nor does Plaintiff cite any case law supporting its position that the Court's decision on the prosecution bar constitutes an "error [that] is apparent to the point of being indisputable" such that it could be considered manifest injustice warranting reconsideration.  *Teri Woods*, 2013 WL 6388560, at *2.

Instead, Plaintiff repeats its original argument based on largely the same cases (*EON, Xerox* and *Two-Way Media*) to allege that the prosecution bar is "overly restrictive and contrary to this Court's precedent."  (D.I. 48 at 2).  Not only are Plaintiff's arguments insufficient to establish manifest injustice, they are simply incorrect.  The Court's decision was correct and plainly supported by case law in this District.  Specifically, as addressed in the original submission, the proposed post-grant prosecution bar is directed to the protection of Defendants' highly valuable source code assets.  Far from being contrary to this Court's precedent, the

language of Defendants' prosecution bar itself was taken directly from Judge Robinson's decision in *Versata*.  2014 WL 117804, at *1.  There, the prosecution bar was tailored to protect source code by preventing attorneys who actually accessed confidential source code materials from participating in post-grant proceedings.  *Id.*  Indeed, consistent with *Deutsche Bank*, this Court and others in this District have imposed even more restrictive post-grant prosecution bars than the one ordered here.  *See CallWave Commc'ns, LLC v. AT&T Mobility, LLC*, C.A. No. 12-1701, Tr. at 36-39 (D. Del. Apr. 9, 2014) (extending prosecution bar to post-grant proceedings) (Exhibit A); *Bear Creek Techs. Inc. v. Verizon Servs. Corp.*, MDL No. 12-2344-GMS, 2012 WL 3190762, at *2 & n.6 (D. Del. July 25, 2012).  Notably, in both *CallWave* and *Bear Creek Tech.*, the Court rejected the very arguments Plaintiff advances here about competitive decision making and litigation burden to Plaintiff.

The cases cited by Plaintiff are not controlling and are distinguishable in any event.  For instance, none of those cases involve the present situation where: (1) the Defendants' principal assets are source code, (2) the post-grant prosecution bar is tailored to protect the source code assets, and (3) the Plaintiff does not have a long term relationship with its counsel.  Moreover, according to its website, Plaintiff's law firm has nearly 50 lawyers in its intellectual property group, and Plaintiff does not explain why barring only those attorneys who actually access Defendants' source code from participating in the IPRs constitutes manifest injustice.  These facts, among others, distinguish the cases Plaintiff cites.

Finally, Plaintiff attempts to take a second bite at the apple by offering a "compromise" position that it could have offered earlier but for some reason did not.  Specifically, Plaintiff now argues in the alternative that attorneys who access source code should be permitted to participate in post-grant proceedings except that they would not be permitted to participate in the actual

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